



IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. **78-608**

CASSANDRA LUMPKIN,

Appellant,

versus

DEPARTMENT OF SOCIAL SERVICES
OF THE STATE OF NEW YORK, THE
ALBANY COUNTY DEPARTMENT OF
SOCIAL SERVICE, PHILIP L. TOIA,
MERLE N. FOGG and JOHN J. FAHEY,

Respondents.

**APPEAL FROM THE COURT OF APPEALS OF
THE STATE OF NEW YORK**

JURISDICTIONAL STATEMENT

JONATHAN P. HARVEY, ESQ.
Attorney for Appellant
Office & P.O. Address
29 Elk Street
Albany, New York 12207
(518) 463-4491

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Constitutional, Statutory and Regulatory Provisions Involved	3
Question Presented	5
Statement of the Case	5
The Federal Questions Are Substantial	8
I. 18 N.Y.C.R.R. 352.16(b) & (c), as interpreted by the Court of Appeals of the State of New York, must comply with applicable federal statutory and regulatory provisions in order to be in harmony with the supremacy clause of the United States Constitution	8
II. 18 N.Y.C.R.R. 352.16(b) & (c), as interpreted by the Court of Appeals of the State of New York is repugnant to sections 233.20(a)(3)(iv)(b) and 233.20(a)(4)(ii)(d) of Title 45 of the Code of Federal Regulations	10
III. 18 N.Y.C.R.R. 352.16(b) & (c), as interpreted by the Court of Appeals of the State of New York, is repugnant to section 507 of Public Law 90-575	12
Conclusion	15
Appendix	
Notice of Appeal, with date of filing	A-1
Order Appealed From, with date of entry	A-3
Uncorrected Opinion of Court of Appeals of State of New York, rendered July 13, 1978, and not yet reported	A-4

	Page
Decision of Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, rendered December 8, 1977 and reported at 59 A.D. 2d 485, 400 N.Y.S. 2d 220 ..	A-10
Memorandum Decision of the Supreme Court of the State of New York, Albany County, rendered February 3, 1977 and reported at 89 Misc. 2d 549, 392 N.Y.S. 2d 188 ..	A-16
Petition of Cassandra Lumpkin, dated August 18, 1976.....	A-19

TABLE OF CASES

<i>Groppi v. Wisconsin</i> , 400 U.S. 505, 27 L. Ed. 2d 1512, 91 S.Ct. 490	10
<i>Hamilton v. Regents of Univ. of Cal.</i> , 293 U.S. 245, 79 L. Ed. 343, 55 S.Ct. 197, reh. den. 293 U.S. 633, 79 L. Ed. 717, 55 S.Ct. 345 ...	10
<i>Hortonville Joint School District No. 1 v. Hortonville Ed. Assn.</i> , 426 U.S. 482, 49 L. Ed. 2d 1, 96 S.Ct. 2308	10
<i>Kingsley Pictures Corp. v. Regents</i> , 360 U.S. 684, 3 L. Ed. 2d 1512, 79 S.Ct. 1362	10
<i>Lake Erie & W.R. Co. v. State Public Utilities Com.</i> , 249 U.S. 422, 63 L. Ed. 684, 39 S.Ct. 345	10
<i>Live Oak Water Users' Asso. v. Railroad Com. of California</i> , 269 U.S. 354, 70 L. Ed. 305, 46 S.Ct. 149	10
<i>McCulloch v. Maryland</i> , 4 Wheat. 316, 4 L. Ed. 579	9
<i>McKillop v. Regents of Univ. of Cal.</i> , 386 F. Supp. 1270 (D.C. Cal., 1975)	10

	Page
<i>Richman v. Juras</i> , 393 F. Supp. 349 (U.S.D.C., Ore., 1975)	14
<i>Shea v. Vialpando</i> , 416 U.S. 251, 40 L. Ed. 2d 120, 94 S.Ct. 1746	9, 14
<i>Sultan R. & T. Co. v. Department of Labor & Industries</i> , 277 U.S. 135, 72 L. Ed. 820, 48 S.Ct. 505	10
<i>Supreme Lodge, etc. v. Meyer</i> , 265 U.S. 30, 68 L. Ed. 885, 44 S.Ct. 432	10

Table of Constitutional, Statutory and Regulatory Provisions

U.S. Constitution, Art. VI	8
20 U.S.C., Sec. 1070a(a)(2)(B)(iv)	13
20 U.S.C., Sec. 1070a(a)(3)	13
42 U.S.C., Sec. 602(a)(7)	12
Sec. 507, P.L. 90-575	8-10, 12-15
45 C.F.R., Sec. 233.20(a)(3)(iv)(b)	8-11
45 C.F.R., Sec. 233.30(a)(4)(ii)(d)	8-11
45 C.F.R., Sec. 190.42a(a)(iii)	13
18 New York Code of Rules and Regulations, Section 352.16(b) & (c)	8-14

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. _____

CASSANDRA LUMPKIN,

Appellant,

versus

DEPARTMENT OF SOCIAL SERVICES
OF THE STATE OF NEW YORK, THE
ALBANY COUNTY DEPARTMENT OF
SOCIAL SERVICE, PHILIP L. TOIA,
MERLE N. FOGG and JOHN J. FAHEY,

Respondents.

**APPEAL FROM THE COURT OF APPEALS OF
THE STATE OF NEW YORK**

JURISDICTIONAL STATEMENT

This is an appeal from the final order of the Court of Appeals of the State of New York entered in this action on July 17, 1978. The Appellant submits this Jurisdictional Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial federal question is presented.

OPINIONS BELOW

The order of the Court of Appeals of the State of New York was accompanied by an uncorrected opinion dated July 13, 1978, which has not yet been reported (App.-4*)

The order of the Appellate Division of Supreme Court, State of New York, Third Judicial Department was accompanied by a decision which is reported at 59 A.D. 2d 485, 400 N.Y.S. 2d 220 (App.-10).

The judgment of the Supreme Court of the State of New York, County of Albany, was accompanied by a memorandum decision which is reported at 89 Misc. 2d 549, 392 N.Y.S. 2d 188 (App.-16)

*All references to App. are to the Appendix following the conclusion of this jurisdictional statement and to the page number thereof.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, section 1257(2), this being an appeal which draws into question the validity of section 352.16(b) & (c) of Title 18, New York Code of Rules and Regulations, on the grounds that it is repugnant to sections 233.20(a)(3)(iv)(b) and 233.20(a)(4)(ii)(d) of Title 45 of the Code of Federal Regulations and to section 507 of Public Law 90-575.

In the event that the Court does not consider appeal the proper mode of review, appellant requests that the papers whereupon this appeal is taken be regarded and acted upon as a petition for a writ of certiorari pursuant to Title 28, United States Code, section 1257(3).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Article VI of the Constitution of the United States, provides in pertinent part:

This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 507 of P.L. 90-575 provides:

For the purposes of any program assisted under Title I, IV, X, XIV, XVI or XIX of the Social Security Act, no grant or loan to any undergraduate student for educational purposes made or insured under any program administered by the Commissioner of Education shall be considered to be income or resources.

Section 233.20(a)(3)(iv)(b) of Title 45 of the Code of Federal Regulations provides in pertinent part:

A State Plan for OAA, AFDC, AB, APTD or AABD must as specified below: ...Provide that, in determining the availability of income and resources, the following will not be included as income: ...loans and grants, such as scholarships, obtained and used under conditions that preclude their use for current living costs.

Section 223.20(a)(4)(ii)(d) of Title 45 of the Code of Federal Regulations provides in pertinent part:

A State Plan for OAA, AFDC, AB, APTD or AABD must as specified below: ...Provide that in determining eligibility for public assistance and the amount of the assistance payment, the following will be disregarded as income and resources: ...Any grant or loan to any undergraduate student for

educational purposes made or insured under any program administered by the Commissioner of Education.

Section 352.16 of Title 18 of the New York Code of Rules and Regulations provides in pertinent part:

(b) When the terms of an award, the legislative intent of a government benefit, the rules of an organization paying a benefit, the nature of a trust fund, or the agreed upon intent of a friend, non-legally responsible relative, social agency or other organization limits the use of cash income, the social services official shall abide by such restriction, when verified. The restriction may limit the use of the income to a specified purpose or to a particular member or members of the household. However, whenever any contribution from a non-legally responsible relative or friend is sought to be restricted for the purpose of supplementing a State prescribed or approved standards it shall not qualify as a permissible restriction of income, unless the social services official determines that the health and welfare of the recipient would be specifically and materially enhanced thereby.

(c)(1) No part of a scholarship, grant or other such income that is necessary to cover the cost of necessary or essential school expenses (e.g., tuition, books, fees, equipment, special clothing needs, transportation to and from school, and child care services necessary for school attendance), and is actually so used, shall be considered as income in determining need and amount of assistance.

(2) No grant or loan to an undergraduate student for educational purposes made or insured under any program administered by the United States Commissioner of Education shall be considered as income or resources in determining need and amount of assistance.

QUESTION PRESENTED

Is section 352.16(b) & (c) of Title 18, New York Code of Rules and Regulations, as interpreted by the Respondents and the Court of Appeals of the State of New York and applied in this case, repugnant to the following laws of the United States:

(a) sections 233.20(a)(3)(iv)(b) and 233.20(a)(4)(ii)(d) of Title 45, Code of Federal Regulations; and/or

(b) section 507 of Public Law 90-575?

STATEMENT OF THE CASE

Appellant Cassandra Lumpkin was enrolled in Albany Business College during the Spring semester of 1976. During that time she was a recipient of Aid to Families with Dependent Children (hereinafter referred to as "AFDC") from Respondent Albany County Department of Social Services. Like thousands of other student recipients of AFDC and other "welfare" grants throughout the United States, Appellant was also the recipient of a federal Basic Educational Opportunity Grant (hereinafter referred to as "BEOG") and of other non-federal educational grants. For the Spring, 1976 semester, Appellant received a BEOG of \$700.00, and an award of \$750.00 pursuant to the New York State Tuition Assistance Program. For the purpose of determining the amount of her awards pursuant to these programs, Appellant had the following school expenses totaling \$2245.00: Tuition, \$800.00; Fees, \$50.00; Books, \$75.00; Allowance for food and lodging, \$1,020.00; and Allowance for personal expenses, \$300.00.

On or about April 16, 1976, the Albany County Department of Social Services issued a Notice of Intent to Reduce Public Assistance to the Appellant. The Albany County

Department of Social Services correctly determined that Appellant had "necessary or essential school expenses" (a term of art used in Section 352.16(c)(1) of Title 18, New York Code of Rules and Regulations which under the facts of this case includes only tuition, books and fees) adding up to \$925.00 for the 1976 Spring semester. The Department then proceeded to apply Appellant's BEOG against these "necessary or essential school expenses", reducing the figure by \$700.00 down to \$225.00. The Department then determined that \$525.00, a sum equal to the excess of Appellant's Tuition Assistance Program award over her "necessary and essential school expenses" as reduced by BEOG, was available income to the Appellant and that her AFDC grant should be reduced so as to reflect this "income".

Appellant requested a Fair Hearing with respect to this determination. On May 24, 1976, such a hearing was held before Merle N. Fogg, a hearing officer acting on behalf of Respondent New York State Department of Social Services. On August 6, 1976, a decision was rendered by Respondent Philip L. Toia as Commissioner of Appellee New York State Department of Social Services which affirmed the determination of the Albany County Department of Social Services.

Appellant then commenced an action pursuant to Article 78 of the Civil Practice Law and Rules of the State of New York seeking judicial review of these administrative determinations. At paragraphs 12 and 13 of the Petition bringing on this action, (set forth in full without exhibits starting at page App. 19 of the Appendix submitted herewith) the Appellant specifically contended that the determinations of the Respondents were contrary to the various federal constitutional, regulatory, decisional and statutory provisions of the law applicable to this case, as well as contrary to the New York State regulatory provisions implementing these federal provisions.

Appellant's action was initially heard by the Supreme Court of the State of New York. In a memorandum decision

dated February 3, 1977, that Court held that the Respondents' determinations were contrary to the provisions of Section 352.16(c) of Title 18 of the New York Code of Rules and Regulations. A judgment was entered upon this decision annulling the determination of Respondents. A side issue was Appellant's application to pursue this action as a class action. This application was denied and was not at issue in any subsequent appeals.

Respondents appealed from the judgment in favor of Appellant to the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department. In a decision rendered December 8, 1977, the Appellate Division unanimously held that the judgment of the Supreme Court of the State of New York should be reversed and the determination of the New York State Commissioner of Social Services, dated August 6, 1976, reinstated. The Appellate Division, in short, held that the Respondents had correctly interpreted Section 352.16 of Title 18 of the New York Code of Rules and Regulations in making their determinations and accepted "the administrative conclusion that the State regulation complies with Federal standards." (App. 13)

Appellant then appealed to the Court of Appeals of the State of New York from the order of reversal by the Appellate Division. The appeal was taken as of right pursuant to Section 5601(a) of the New York State Civil Practice Law and Rules which authorizes an appeal as of right from an order of the Appellate Division which finally determines the action where such order directs a reversal of the judgment appealed from. On July 13, 1978, the Court of Appeals issued a unanimous opinion affirming the order of the Appellate Division, utilizing essentially the same rationale as the Appellate Division. The order of affirmance was entered in the Albany County Clerk's Office on July 17, 1978. Appellant now appeals to the Supreme Court of the United States from this order.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The fundamental issue presented on this appeal to the United States Supreme Court is one which affects virtually every recipient of federally sponsored public assistance who is also a student in an institution of higher learning or who has a student in his family. The issue is borne of the so-called "new federalism", under which the various states of the union individually administer federally funded programs tailored by the states to meet their individual needs and circumstances, and also to comply with certain uniform standards established by the federal government. The highest court of the State of New York has construed section 352.16 of Title 18 of New York Code of Rules and Regulations so as to allow the State Department of Social Services, in reckoning the amount of aid to dependent children benefits, first to allocate federal educational grants to the payment of "necessary or essential school expenses," as defined in that regulatory provision, and in the event of an excess of such expenses then to allocate state and private educational grants to such excess to the extent required, with any remaining surplus of the state and private grants to be considered as available income in computation of AFDC, and that this procedure is in accord with applicable federal statutes and regulatory provisions. Appellant once again contends that this procedure is contrary to sections 233.20(a)(3)(iv)(b) and 233.30(a)(4)(ii)(d) of Title 45 of the Code of Federal Regulations, and more importantly, is contrary to both the letter and intent of section 507 of Public Law 90-575, as enacted by the Congress of the United States.

I

Article VI of the Constitution of the United States provides that the laws of the United States made in pursuance

of the constitution shall be the supreme law of the land. "By this declaration, the states are prohibited from passing any acts which shall be repugnant to a law of the United States." *McCulloch v. Maryland*, 4 Wheat. at 361, 4 L. Ed. at 590.

AFDC is financed in large part by the Federal Government and participating states must submit AFDC plans in conformity with the applicable laws enacted by Congress and in conformity with the regulations promulgated by the Secretary of Health, Education and Welfare pursuant to section 1302 of Title 42, United States Code. *Shea v. Vialpando*, 416 U.S. 251, 40 L. Ed. 2d 120, 94 S.Ct. 1746.

Among the regulations promulgated by HEW with respect to AFDC are section 233.20(a)(3)(iv)(b) of Title 45 of Code of Federal Regulations, which provides that no educational grant, such as BEOG or an award under the Tuition Assistance Program, shall be considered as income in determining the availability of income and resources, so long as they are obtained and used under conditions which preclude their use for current living costs, and section 233.20(a)(4)(ii)(d) of the same Title, which provides that a grant or loan made by the United States Commissioner of Education, such as BEOG, must be disregarded as income and resources, without any qualification with respect to current living costs. Additionally, by the enactment of section 507 of Public Law 90-575, the Congress has provided that for the purposes of AFDC, BEOG shall not be considered to be income or resources.

The New York State Department of Social Services, in an attempt to comply with these federal provisions, promulgated section 352.16(b) & (c) of Title 18, New York Code of Rules and Regulations as a part of its plan for administering AFDC. The highest court of the State of New York, over the Appellant's argument that such an interpretation is repugnant to the aforementioned federal statute and regulations, has upheld and agreed with the Respondents' interpretation of 18 NYCRR 352.16, allowing BEOG and other federal grants to be taken into consideration in determining if other educational grants, loans and scholarships can be treated as available income.

It is clear that the meaning attributed by the highest court of a state to a statute of the state must be accepted by the United States Supreme Court, on review, as though it had been specifically expressed in the statute. *Supreme Lodge, etc. v. Meyer*, 265 U.S. 30, 68 L. Ed. 885, 44 S.Ct. 432; *Hortonville Joint School District No. 1 v. Hortonville Ed. Ass'n.*, 426 U.S. 482, 49 L. Ed. 2d 1, 96 S.Ct. 2308. The court is absolutely bound to accept the interpretation of 18 N.Y.C.R.R. 352.16 by the New York State Court of Appeals. See *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684, 3 L. Ed. 2d 1512, 79 S.Ct. 1362; and *Groppi v. Wisconsin*, 400 U.S. 505, 27 L. Ed. 2d 571, 91 S.Ct. 490. It is clear that 18 N.Y.C.R.R. 352.16, being legislative in character, is a state statute for the purposes of invoking the jurisdiction of the United States Supreme Court under section 1257 of Title 28, United States Code. Compare *Lake Erie & W.R. Co. v. State Public Utilities Com.*, 249 U.S. 422, 63 L. Ed. 684, 39 S.Ct. 345, *Live Oak Water Users' Asso. v. Railroad Com. of California*, 269 U.S. 354, 70 L. Ed. 305, 46 S.Ct. 149; *Sultan R. & T. Co. v. Department of Labor & Industries*, 277 U.S. 135, 72 L. Ed. 820, 48 S.Ct. 505; *Hamilton v. Regents of Univ. of Cal.*, 293 U.S. 245, 79 L. Ed. 343, 55 S.Ct. 197, reh. den. 293 U.S. 633, 79 L. Ed. 717, 55 S.Ct. 345; and *McKillop v. Regents of Univ. of Cal.*, 386 F. Supp. 1270 (1975, D.C. Cal.).

II

The practice of considering BEOG in determining the availability of non-federal grants, such as Appellant's Tuition Assistance Program Award, as income for the purposes of AFDC, as has been held by the Court of Appeals of New York State to be authorized by 18 N.Y.C.R.R. 352.16(b) & (c), is clearly contrary to any fair reading of sections 233.20(a)(3)(iv)(b) and 233.30(a)(4)(ii)(d) of Title 45, Code of Federal Regulations. The rationale utilized by the Respondents and

the appellate courts of New York State in determining that this procedure complies with the cited federal regulations appears to be that since the proceeds of BEOG, or any other federal educational grant or loan for that matter, may be utilized to meet those educational costs other than current living costs, this frees non federal educational grants and scholarships, such as the Appellants Tuition Assistance Program award, for utilization in meeting current living costs. If section 233.20(a)(3)(iv)(b) stood alone, the procedure utilized by the Respondents in determining the availability of Appellant's Tuition Assistance Program award as income may well have been in compliance with this regulation. But section 233.20(a)(3)(iv)(b) does not stand alone and it must be read in conjunction with section 233.30(a)(4)(ii)(d). This latter section concerns itself only with BEOG and other grants or loans made or insured by the United States Commissioner of Education. It does not limit itself to barring consideration of BEOG as available income or resources, as section 233.20(a)(3)(iv)(b) does with respect to educational grants or loans in general, but rather refers to the entire process of "determining eligibility for public assistance and the amount of the assistance payment" and states that federal grants such as BEOG "will be disregarded as income or resources." Of especial significance is that the term "income or resources" is not coupled with the modifier "available" in section 233.20(a)(4)(ii)(d) as it is in section 233.20(a)(3)(iv)(b). The obvious import of this is that BEOG cannot be treated as available or unavailable income or resources and must be totally disregarded in determining eligibility for public assistance and the amount of the assistance program, including the determination of the availability of other grants or loans pursuant to 233.20(a)(3)(iv)(b). In short, as far as AFDC is concerned, federal grants and loans such as BEOG, do not exist. In the instant case, the Respondents have, under the authority of 18 N.Y.C.R.R. 352.16(b) & (c), considered Appellant's BEOG as income or resources, albeit not "available" income or resources, in determining that Appellant's Tuition Assistance

Plan award is to some extent available income where, in the absence of BEOG and all other things being equal, it otherwise would not have been so considered.

Accordingly, 18 N.Y.C.R.R. 352.16(b) & (c), at least insofar as it authorizes the procedure utilized by Respondents in this case, is invalid because it is repugnant to the cited provisions of the Code of Federal Regulations.

III

Even if it is considered that 18 N.Y.C.R.R. 352.16(b) & (c) is not in direct contradiction to the cited regulations, this state regulatory provision must still be declared invalid because it is repugnant to both the letter and Congressional intent of section 507 of Public Law 90-575. Section 507 provides that for the purposes of AFDC, federal grants such as BEOG shall not be considered to be income or resources.

The appellate courts of New York State have cited both this statute and section 602(a)(7) of Title 42, United States Code, in reaching the decisions to uphold the position taken by Respondents. Apparently they have ignored the fact that section 507 of P.L. 90-575 was quite obviously intended to take federal educational grants outside the operation of 42 U.S.C. 602(a)(7) and to resolve the question of treatment of these grants under programs such as AFDC, and have instead ascribed to the Congress the act of creating a conflict between these two statutes. A review of the statutory and regulatory provisions applicable to BEOG clearly demonstrate that the Congress intended that the awarding of BEOG should have no affect on a public assistance recipient's eligibility or amount of payment under such programs, at the same time being conscious that BEOG monies would, in some cases, be utilized by the recipient to meet what otherwise would be "current

living expenses" under the public assistance programs.

Section 1070a(a)(3) of Title 20, United States Code, together with section 190.42a(a)(iii) of Title 45, Code of Federal Regulations, clearly require that income from income maintenance programs such as AFDC be considered in determining the amount of a BEOG award which may be given to the applicant. It is inconceivable that the Congress inadvertently created a situation where the amount of a BEOG award is determined in part by the level of AFDC payments received and then the level of AFDC is adjusted downward because the BEOG has caused other grants and scholarships to be considered available income, subsequently necessitating another adjustment to the amount of BEOG because the level of AFDC has been decreased, and so on, *ad infinitum*. It is apparent and logical that Congress recognized that there would be a conflict reminiscent of the "doctrine of renvoi" between the administration of federal educational programs such as BEOG and public assistance programs such as AFDC, and consciously resolved the problem by deciding that monies received under public assistance programs would affect the amount of awards under federal educational grant programs and that the opposite would not be true. In addition, the effect of such a resolution is to tell the prospective student whose family has an adjusted income of \$4,000.00 per year, for example, that he or she will receive the same effective net benefit under federal educational programs as any other student in the same circumstances, without regard to whether or not the source of family income is public assistance. This is certainly consonant with the overall intent of the Higher Education Act of 1968 (P.L. 90-575) that educational opportunities be equally available to all to the maximum extent possible. The use of BEOG in determining the availability of other grants and loans as income for the purposes of AFDC, as authorized by 18 N.Y.C.R.R. 352.16(b) & (c), only resurrects the problems that section 507 of P.L. 90-575 was intended to resolve.

Another consideration supporting the view that section 507 of P.L. 90-575 was intended to and does bar the consideration given to BEOG by the Respondents is section 1070a(a)(2)(B)(iv) of Title 20, United States Code, which

provides that "room and board," a current living expense for the purpose of AFDC, is an actual cost of school attendance for the purposes of BEOG. This, in conjunction with section 507 of P.L. 90-575, makes it clear that the Congress contemplated that BEOG would be used for what are considered "current living costs" for the purpose of public assistance programs, and, provided that, nevertheless, no BEOG monies or other federal grants or loans shall be considered as income or resources for the purposes of public assistance programs. Respondents are now seeking to avoid this Congressional intent by the subterfuge of claiming that only non-federal scholarships or grants are being considered as available income. What is not said is that the BEOG monies are being considered as income, although not as available income, by their application of BEOG to only those educational expenses which do not overlap with current living costs.

The problem raised by this appeal has been considered in one federal decision, to wit: *Richman v. Juras*, 393 F. Supp. 349 (U.S.D.C., Ore., 1975). In that case a position similar to that taken by the Respondents in this case was upheld by the court. However, it should be noted that the decision relied heavily on a legislative history contained in 1972 U.S. Code, Cong. & Admin. News, v. 3, pp. 5164 and 5321. However, this is a legislative history of P.L. 92-603, concerning Supplemental Security Income, and not being at all relevant to the issue before that court. It is respectfully submitted to this court that the *Richman* decision, *supra*, is of no value in considering the merits of the instant appeal.

The Supreme Court has twice recently observed that the "AFDC program is an area in which Congress has, at times, voiced its wishes in muted strains and left it to the courts to discern the theme in the cacophony of political understanding." *Shea v. Vialpando*, 416 U.S. at 266, 40 L. Ed. 2d 120, 94 S.Ct. 1746. But just as Congress has spoken with firmness and clarity with respect to the issue presented in *Shea, supra*, Congress has so spoken with respect to the issue presented in this case. Section 352.16(b) & C() of Title 18, New York Code of Rules

and Regulations, as interpreted by the Court of Appeals of the State of New York, is clearly repugnant to section 507 of Public Law 90-575.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the federal question presented is substantial and of great public importance. It is further submitted that this Court should note probable jurisdiction and set the matter for argument.

Respectfully submitted,

JONATHAN P. HARVEY
Attorney for Appellant
Office and P.O. Address
c/o Harvey and Harvey
29 Elk Street
Albany, New York 12207
Telephone: (518) 463-4491

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. _____

CASSANDRA LUMPKIN,

Appellant,

versus

DEPARTMENT OF SOCIAL SERVICES
OF THE STATE OF NEW YORK, THE
ALBANY COUNTY DEPARTMENT OF
SOCIAL SERVICE, PHILIP L. TOIA,
MERLE N. FOGG and JOHN J. FAHEY,

Respondents.

APPEAL FROM THE COURT OF APPEALS OF
THE STATE OF NEW YORK

APPENDIX TO JURISDICTIONAL STATEMENT

JONATHAN P. HARVEY, ESQ.
Attorney for Appellant
Office & P.O. Address
29 Elk Street
Albany, New York 12207
(518) 463-4491

TABLE OF CONTENTS

	Page
Notice of Appeal, with date of filing	A-1
Order appealed from, with date of entry	A-3
Uncorrected Opinion of Court of Appeals of the State of New York, rendered July 13, 1978, and not yet reported	A-4
Decision of Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, rendered December 8, 1977 and reported at 59 A.D. 2d 485, 400 N.Y.S. 2d 220	A-10
Memorandum Decision of the Supreme Court of the State of New York, Albany County, rendered February 3, 1977 and reported at 89 Misc. 2d 549, 392 N.Y.S. 2d 188	A-16
Petition of Cassandra Lumpkin, dated August 18, 1976	A-19

APPENDIX

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

[Same Title]

Index No. 1552-77

Notice is hereby given that Cassandra Lumpkin, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order and judgment of the Court of Appeals of the State of New York affirming the order of the Appellate Division of the Supreme Court, Third Judicial Department of the State of New York which reversed a judgment of the Supreme Court of the State of New York, in favor of the Appellant and reinstated the determination of the New York State Commissioner of Social Services, dated August 6, 1976, entered in this action on July 17, 1978.

This appeal is taken pursuant to section 1257(2) of Title 28 of the United States Code.

Dated: September 29, 1978.

Yours, etc.

HARVEY and HARVEY
Attorneys for Petitioner-Appellant
Office & P.O. Address
29 Elk Street
Albany, New York 12207
Telephone: (518) 463-4491

TO: ALBANY COUNTY CLERK
Albany County Court House
Eagle Street
Albany, New York 12207

Notice of Appeal

HON. LOUIS J. LEFKOWITZ
Attorney General of the State of New York
Clifford Royael, of Counsel
The Capitol
Albany, New York 12224

STANLEY WALKER, JR., ESQ.
Assistant Social Services Attorney
c/o Department of Social Services
40 Howard Street
Albany, New York 12207

Filed: Office of Albany County Clerk
September 29, 1978

REMITTITUR

The Hon. Charles D. Breitel, Chief Judge, Presiding

[Same Title]

The appellant in the above entitled appeal appeared by Harvey and Harvey; the respondents appeared by Stanley Walker, Jr; and Louis J. Lefkowitz, Attorney General of the State of New York.

The Court, after due deliberation, orders and adjudges that the order is affirmed, without costs. Opinion by Jones, J. All concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Albany County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

JOSEPH W. BELLACOSA,
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, July 13, 1978

ENTERED:
Office of the Albany County Clerk,
July 17, 1978

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

[Same Title]

(345) Jonathan P. Harvey, Albany, for appellant. Stanley G. Walker, Jr., for respondent Albany Cty. Louis J. Lefkowitz, Attorney-General (Clifford A. Royael & Jean M. Coon for counsel) for respondent State.

JONES, J.

We uphold the practice of the State Department of Social Services, in reckoning the amount of aid to dependent children benefits, first to allocate federal educational grants to the payment of educational and education related expenses, and in the event of an excess of such expenses then to allocate state and private educational grants to such excess to the extent required, with any remaining surplus of grant to be considered as available income in computation of the ADC allowance.

In the present case during the period petitioner was eligible for ADC she was attending Albany Business College. Her educational expenses, made up of tuition (\$800.00), fees (\$50.00), and books (\$75.00), totalled \$925.00. She was receiving educational grants — a Federal Basic Education Opportunity Grant of \$700.00 and a New York Tuition Assistance Program grant of \$750.00. The Albany County Department of Social Services in recomputing her ADC entitlement first applied the BEOG against the educational expenses, leaving an excess of such expenses of \$225.00. The County Department then allocated that amount of the TAP grant for this purpose and considered the \$525.00 resulting balance of the TAP grant as available income in computing petitioner's ADC allowance.

After a fair hearing the State Commissioner of Social

Opinion

Services upheld the action of the local department. Petitioner thereupon instituted the present proceeding under Article 78 of the Civil Practice Law and Rules to review the State Commissioner's determination. Special Term annulled the determination and the Appellate Division reversed. We now affirm the Appellate Division, thereby upholding the method of computation employed by the local department and approved by the State Commissioner.

Inasmuch as the State of New York has elected to participate in the Federal Aid to Families with Dependent Children program, federal statutes and regulations are controlling to the extent that they are applicable (*Matter of Dunbar v. Toia*, ___ N.Y.2d ___, [decided herewith], slip opn. p. 2). By way of relevant statutory provision, subdivision (a) (7) of section 602 of Title 42 of the United States Code provides:

"A State plan for aid and services to needy families with children must*** provide that the State agency shall, in determining need, take into consideration *any other income and resources* of any child or relative claiming aid to families with dependent children***" (emphasis added).

Section 507 of Public Law 90-75 provides:

"For the purposes of [the aid to families with dependent children program, inter alia] no grant or loan to any undergraduate student for educational purposes made or insured under any program administered by the Commissioner of Education shall be considered to be income or resources."

Federal regulations adopted to implement the AFDC program provide that, in determining the availability of income and resources, grants (such as scholarships) which are obtained and used under conditions that preclude their use for current living costs shall not be included as income (45 CFR, § 233.20 [a][3][iv][b]), and further provide that, in determining need

Opinion

and the amount of the assistance payment, any grant to an undergraduate student for educational purposes made or insured under programs administered by the Commissioner of Education shall be disregarded as income and resources (45 CFR, § 233.20[a][4][ii][d]).

Pertinent regulations of the New York State Department of Social Services provide that no part of a grant that is necessary to cover the cost of necessary or essential school expenses (e.g., tuition, books, fees, equipment, special clothing needs, transportation to and from school, and child-care services necessary for school attendance), and is actually so used, shall be considered as income in determining need and amount of assistance (18 NYCRR, § 352.16[c][1]), and that no grant to an undergraduate student for educational purposes made or insured under any program administered by the United States Commissioner of Education shall be considered as income or resources in determining need and amount of assistance (18 NYCRR, § 352.16[c][2]).

For purposes of the present proceeding, petitioner concedes that to the extent TAP and other non-federal educational awards exceed necessary and essential school expenses as defined in 18 NYCRR, § 352.16(c)(1) such excess may properly be considered income and resources for the purpose of determining AFDC allowances. It is petitioner's contention, however, that in computing the amount by which such non-federal educational awards exceed necessary and essential school expenses it is improper under the applicable statutes and regulations first to reduce such expenses by the amount of BEOG or other federal educational grants. The County Department and the State Commissioner interpret the same statutes and regulations to permit the application of both federal and state educational grants to defray actual educational expenses for which they were awarded. They recognize that any excess of a federal grant over actual educational expenses cannot be considered in determining

Opinion

public assistance needs, but assert that no such restriction applies to any excess of a state educational grant. Finally, it is their position that in applying federal and state educational grants, they may apply them against actual educational expenses in that order, e.e., first the more restricted federal grant and then the less restricted state grant, thereby to produce the final maximum deduction in computation of public assistance entitlement.

Initially we observe that the interpretation placed on the statutes by the Commissioner should be accepted if it is not irrational or unreasonable (*Matter of Howard v. Wyman*, 28 NY2d 434, 438). It cannot be said, absent an explicit restriction, that it is irrational to apply an educational grant to educational expenses, the very purpose for which the grant was awarded. Thus, we start with the premise that either BEOG or TAP awards may properly be allocated to actual educational expenses. Inasmuch as there is a restriction on the application of any excess of the federal grant whereas no such restriction attaches to any excess with respect to the state grant, it is apparent that different consequences will attend the order of application of the two educational grants. We perceive no proscription in statute or regulation against the Commissioner's selecting a priority of application which will operate to produce the maximum reduction in the public assistance grant. From the recipient's point of view, much as she might enjoy the use of the additional funds, it was the purpose of both educational grants to meet the legitimate costs of education, not to provide the grantee with free funds in excess thereof. In a practical sense the BEOG and TAP awards may be said to overlap, and to that extent to be duplicative. From the standpoint of the public fisc, it makes little sense to urge that public assistance funds should be expended notwithstanding that the recipient has an excess of funds to meet her educational needs. If it be considered that educational funds are being used to subsidize welfare programs, the remedy, if

Opinion

any be needed, lies in the monitoring of educational grants to eliminate duplication.

The allocation procedure employed by the State Commission satisfies both the objective of the educational grant programs (to enable the grantee to obtain an education which otherwise might be denied her) and the two-fold objectives of the AFDC program (to furnish financial assistance to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life, and to help such parents or relatives to attain or retain capability for maximum self-support [43 USC, § 601]), while practicing a responsibly frugal stewardship of available public assistance funds.

Finally, it is not without significance that the officials of the federal Department of Health, Education and Welfare advise that the allocation procedures employed by the State Commissioner are acceptable to the federal authorities from both a legal and programmatic point of view.¹

We therefore reject the contentions advanced on behalf of petitioner and sustain the determination made by the State Commissioner. (Cf. *Richman v. Juras*, 393 F Supp 349.)

Accordingly, the order of the Appellate Division should be affirmed, without costs.

* * * * *

Order affirmed, without costs. Opinion by Jones, J. All concur.

Decided July 13, 1978

1. See letters from the Acting Assistant Regional Commissioner for OFA, which accompany respondents' brief in this Court.

DECISION OF APPELLATE DIVISION

[Same Title]

December 8, 1977

Judgment reversed, on the law, without costs, and determination of the New York State Commissioner of Social Services, dated August 6, 1976, reinstated.

Opinion per LARKIN, J.

GREENBLOTT, J. P., KANE, MAIN and MIKOLL, JJ., concur.

DECISION OF APPELLATE DIVISION

[Same Title]

Argued, October 14, 1977.

Before:

HON. LOUIS M. GREENBLOTT,

Justice Presiding,

HON. T. PAUL KANE,

HON. ROBERT G. MAIN,

HON. JOHN L. LARKIN,

HON. ANN T. MIKOLL,

Associate Justices.

APPEAL from a judgment of the Supreme Court at Special Term (William R. Murray, J.), entered February 9, 1977 in Albany County, which granted petitioner's application, in a proceeding pursuant to CPLR article 78, to annul the fair hearing decision of the Commissioner of the Department of Social Services of the State of New York reducing petitioner's grant of aid to families with dependent children (AFDC) by budgeting as income an educational grant she received in excess of her educational expenses, and directed the Albany County Department of Social Services to reimburse the petitioner for any monies withheld.

LOUIS J. LEFKOWITZ, Attorney-General (Clifford A. Royael and Jean M. Coon of counsel), for Department of Social Services of the State of New York, respondent, The Capitol, Albany, New York 12224.

STANLEY WALKER, JR. for John J. Fahey and another, appellants, 40 Howard Street, Albany, New York 12207.

HARVEY & HARVEY (Jonathan Harvey of counsel), for respondent, 29 Elk Street, Albany, New York 12207.

OPINION FOR REVERSAL

Decision of Appellate Division

LARKIN, J.

Petitioner attended Albany Business College through the spring semester of 1976, during which time she was receiving AFDC. For the 1976 spring semester petitioner, with educational expenses of \$925, received a Federal Basic Educational Opportunity Grant (BEOG) of \$700 and a State Tuition Assistance Program (TAP) award of \$750. In April, 1976 the Albany County Department of Social Services reduced the petitioner's AFDC grant by budgeting as income a portion of the TAP grant received for the 1976 spring semester. The State Commissioner of Social Services, by a fair hearing decision dated August 6, 1976, ruled that the agency had properly found that \$525 of petitioner's TAP grant should be budgeted as income in figuring her AFDC grant because all of her educational expenses had been met by the \$700 BEOG grant plus \$225 of the TAP award.

Special Term, in annulling the Commissioner's determination, relied principally upon the New York State regulation set forth in section 352.16(c) of title 18 of NYCRR, which provides:

(1) No part of a scholarship, grant or other such income that is necessary to cover the cost of necessary or essential school expenses (e.g., tuition, books, fees, equipment, special clothing needs, transportation to and from school, and childcare services necessary for school attendance), and is actually so used, shall be considered as income in determining need and amount of assistance.

(2) No grant or loan to an undergraduate student for educational purposes made or insured under any program administered by the United States Commissioner of Education shall be considered as income or resources in determining need and amount of assistance.

The decision stated that the "clear command" of this regula-

Decision of Appellate Division

tion is that BEOG monies should not be applied against educational expenses in determining whether a portion of a TAP award can be applied against an AFDC grant. Special Term also found that because these programs serve different purposes "[t]o reduce basic assistance grants on the basis of educational grants would reduce the incentives behind and the quality of the latter program". We disagree and conclude that Special Term improperly annulled the Commissioner's determination.

We find no New York or Federal appellate level cases in point. As such, we resort to general rules of construction in interpreting the applicable statutes and regulations. The United States Supreme Court has held that the "method of analysis used to define the federal standard of [AFDC] eligibility is no different from that used in solving any other problem of statutory construction" (*Burns v. Alcala*, 420 U.S. 575, 580).

The AFDC program is financed largely by the Federal government on a matching fund basis, but is administered by the individual states. Participating states are required to submit for approval of the Secretary of the United States Department of Health, Education and Welfare (HEW) a plan conforming with the rules and regulations promulgated by HEW (*King v. Smith*, 392 U.S. 309, 316-317; U.S. Code, tit. 42, §§ 601-603; *Social Services Law*, § 358, subd. 1). *The requirement of State conformity to Federal standards applies not only to those set forth in Federal statutes, but also to those promulgated in the regulations of the Secretary of HEW* (U.S. Code, tit. 42, § 1302; *Shea v. Vialpando*, 416 U.S. 251).

The applicable Federal statutes are paragraph 7 of subdivision (a) of section 602 of title 42 of the U.S. Code, which provides that a "State plan for aid and services to needy families with children must ***provide that the State agency shall, in determining need, take into consideration any *** income and resources of any child or relative claiming aid",

Decision of Appellate Division

and section 507 of Public Law 90-575, which provides that for purposes of AFDC and other programs "no grant or loan to any undergraduate student for educational purposes made or insured under any program administered by the Commissioner of Education shall be considered to be income or resources" (82 U.S. Stat. 1063). The implementing Federal regulations specify that a State plan for AFDC must "[p]rovide that, in determining the availability of income and resources, the following will not be considered as income: *** (b) loans and grants, such as scholarships, obtained and used under conditions that preclude their use for current living costs" (45 CFR 233.20[a][3][iv][b]), and must further "[p]rovide that, in determining eligibility for public assistance and the amount of the assistance payment, the following will be disregarded as income and resources: *** (d) Any grant or loan to any undergraduate student for educational purposes made or insured under any programs administered by the Commissioner of Education" (45 CFR 233.20[a][4][ii][d]). Appellants contend that section 352.16 (c) of title 18 of the NYCRR complies with those Federal statutes and regulations. Since a fair reading of the applicable language supports this interpretation and since the appellant Department of Social Services of the State of New York is the agency charged with supervising AFDC throughout the State (*Social Services Law*, § 355), we accept the administrative conclusion that the State regulation complies with Federal standards.

While the petitioner's claim would appear to have considerable merit if we were to look at only section 507 of Public Law 90-75 and its implementing regulations (45 CFR 233.20[a][4][ii][d]; 18 NYCRR 352.16[c][2]), it flies in the face of paragraph 7 of section 602 of title 42 of the U.S. Code, which requires that "any" income and resources should be taken into consideration in determining need for AFDC, and section 233.20(a)(3)(iv)(b) of title 45 of CFR which allows loans and scholarships to be exempted from income only when received "under conditions that preclude their use for current living

Decision of Appellate Division

costs". (See also, 18 NYCRR 352.16[c][1]). When two statutory or regulatory provisions are potentially in conflict, they should be construed in such a manner that the overriding purposes of both can be preserved (*Markham v. Cabell*, 326 U.S. 404). Statutes should not be construed so as to negate their own stated purposes (*New York Dept. of Social Services v. Dublino*, 413 U.S. 405). The stated purposes of the AFDC program is to provide aid for "needy children" (U.S. Code, tit. 42, § 602, par. [a]; *Shea v. Vialpando*, *supra*). To provide a windfall of money because of overlapping educational programs would be contrary to this purpose. Finally, the construction of a statute by the administrative agency charged with its enforcement should be followed unless there are compelling reasons for not doing so (*New York Dept. of Social Services v. Dublino*, *supra*; *Matter of Howard v. Wyman*, 23 NY 2d 434).

We hold that BEOG and related grants can be taken into consideration by welfare agencies in determining if other educational loans, grants and scholarships which are not administered by the United States Commissioner of Education can be treated as available income in determining AFDC benefits (*Richman v. Juras*, 393 F. Supp. 349).

The petitioner further contends that the TAP award is not available income because the TAP monies are restricted within the meaning of section 352.16 (b) of title 18 of NYCRR which provides:

When the terms of an award, the legislative intent of a government benefit, the rules of an organization paying a benefit, the nature of a trust fund, or the agreed upon intent of a friend, non-legally responsible relative, social agency or other organization limits the use of cash income, the social services official shall abide by such restriction, when verified. The restriction may limit the use of the income to a specified purpose or to a particular member or members of the household. (See 45 CFR 233.20[a][3][vii].)

Decision of Appellate Division

Petitioner's argument is that since the TAP award cannot exceed tuition (Education Law, § 667, subd. 1) and is intended for tuition, it must be deemed needed and used for tuition. We find no such restriction in the Education Law. We cannot accept the claim that section 352.16 (b) of title 18 of NYCRR limited the authority of the appellant social services agencies and officials to make an independent determination as to whether the TAP funds in question were actually being used for tuition.

Petitioner further relies upon section 667 (subd. 4, par. 2, subpar. [b]) of the Education Law which limits TAP awards to the amount by which "annual tuition *** exceeds the total of all other state, federal, or other educational aid that is received *** by such student during the school year". (See also, 8 NYCRR 145-2.13). Petitioner's assertion that, "[i]f there is an actual overlap, TAP will be reduced" is incorrect insofar as BEOG grants are concerned because State education regulations provide that BEOG awards shall not limit the amount of TAP grants (8 NYCRR 145-2.13[a] and 8 NYCRR 145-1.11). Although there is general authority in section 667 for the Commissioner of Education to prevent duplication of educational awards by reducing the TAP award, when, as with BEOG grants, no such reduction is made, the appropriate social services agency has the authority to take such duplicate funds into consideration as income in determining AFDC payments (U.S. Code, tit. 42, § 602, par 7; 45 CFR 233.20 [a][3][iv][b]; 18 NYCRR 352.16[c][1]).

The judgment should be reversed, on the law, without costs, and the determination of the New York State Commissioner of Social Services, dated August 6, 1976, reinstated.

MEMORANDUM DECISION

[Same Title]

Supreme Court, Albany County Special Term, Part I,
August 27, 1976
William R. Murray, Presiding
(Calendar #73)

APPEARANCES:

For the Motion: HARVEY and HARVEY, ESQS.
Attorneys for Petitioner.

In Opposition: HON. LOUIS J. LEFKOWITZ,
Attorney General of the State
of New York
Attorney for Respondents,
The Department of Social Services
of the State of New York and
Philip L. Toia.

ROBERT LYMAN, ESQ.
Attorney for Respondent, Fahey.

The application is for a review of a determination by respondents that petitioner's grant under the aid for Dependent Children program was to be budgeted with regard to receipt by petitioner of a Federal Basic Educational Opportunity Grant.

During the time that petitioner was eligible to receive ADC funds, she was attending Albany Business College. To meet her educational expenses, petitioner was receiving funds from New York's Tuition Assistance Program and the Federal Basic Educational Opportunity Grants Program. On April 16, 1976, the Albany County Department of Social Services determined to reduce the petitioner's ADC grant by budgeting

Memorandum Decision

part of the educational grants received by her for the 1976 spring semester. Petitioner appealed for a fair hearing from respondent New York State Department of Social Services and that agency affirmed the local department's procedure whereupon petitioner commenced this Article 78 proceeding.

New York State Social Services regulations provide as follows:

No part of a scholarship, grant or other such income that is necessary to cover the cost of necessary or essential school expenses (e.g., tuitions, books, fees, equipment, special clothing needs, transportation to and from school, and childcare services necessary for school attendance), and is actually so used, shall be considered as income in determining need and amount of assistance. 18 NYCRR 352.16 (c) (1).

No grant or loan to an undergraduate student for educational purposes made or insured under any program administered by the United States Commissioner of Education shall be considered as income or resources in determining need and amount of assistance. 18 NYCRR 352.16(c)(2).

Respondents supporting papers disclose no lawful excuse for their refusal to follow the clear command of these regulations. It seems that respondents major basis for argument is that these grants to petitioner are overlapping and that she is, in effect, "ripping off" the welfare system. Even if this Court were to agree that the grants are overlapping, neither this Court nor respondents are free to ignore the law. Moreover, the Court agrees with petitioner that these assistance programs are quite separable and are aimed at distinct needs. To reduce basic assistance grants on the basis of educational grants would reduce the incentives behind and quality of the latter program.

This proceeding will not be treated as a class action because it appears to this Court that future petitioners will be protected by the doctrine of *stare decisis*.

Memorandum Decision

The determination of the Albany County Department of Social Services of April 16, 1976, as affirmed by the fair hearing decision of August 6, 1976, of the New York State Department of Social Services is hereby annulled and respondent Albany County Department is ordered to reimburse petitioner for any monies withheld by said determination in accordance with this opinion.

Dated: February 3rd, 1977 at
Troy, New York.

WILLIAM R. MURRAY
Justice of the Supreme Court

PETITION

[Same Title]

Petitioner, CASSANDRA LUMPKIN, respectfully alleges:

1. She resides at 57 Dove Street, City and County of Albany, State of New York and was enrolled as a full-time second year student at Albany Business College during the Spring, 1976 academic semester.

2. She brings this suit on behalf of herself and on behalf of all others similarly situated as students enrolled at Albany Business College during the Spring, 1976 academic semester or at any subsequent time, who are qualified recipients of Aid to Families with Dependent Children or Home Relief funds from the respondents, Department of Social Services and who also receive loans or grants under programs administered by the United States Commissioner of Education together with other various loans, grants or scholarships.

3. During the Spring, 1976 academic semester, petitioner was a duly qualified recipient of Aid to Families with Dependent Children.

4. For the 1976 Spring Semester, petitioner received the following grants; (1) New York State Tuition Assistance Program in the sum of \$750.00 and (2) United States Basic Educational Opportunity Grant in the sum of \$700.00.

5. Petitioner's "necessary or essential school expenses" as defined in Section 352.16 of the Regulations of the New York State Department of Social Services were: (a) Tuition — \$800.00, (b) Fees — \$50.00, and (c) Books — \$75.00. Petitioner's additional "related" educational expenses, as set forth in 20 U.S.C. 1070 (Basic Educational Opportunity Act) included: (d) Meals and Lodging — \$1,020.00, and (e) Personal Expenses — \$300.00.

6. On or about March 17, 1976, Edward Shannon, Senior Welfare Coordinator of Respondent, ALBANY COUNTY DEPARTMENT OF SOCIAL SERVICES received a letter

Petition

from Barbara Zaron, Director of the Office of Employment Programs of Respondent, NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES stating that it was the policy of New York State to charge "necessary or essential school expenses" *first* against any monies received under programs administered by the United States Commissioner of Education. A copy of said letter is annexed hereto as Exhibit "A" and made a part hereof.

7. The aforementioned policy statement was reiterated to Mr. Andrew Carnell, Vice-President of Albany Business College in a letter received by him from Mr. Shannon on or about March 22, 1976. A copy of said letter is annexed hereto as Exhibit "B" and made a part hereof.

8. On or about April 16, 1976, petitioner received a Notice Of Intent to reduce public assistance from \$155.00 per month to \$107.58, commencing April 24, 1976 pursuant to a determination by the respondent ALBANY COUNTY DEPARTMENT OF SOCIAL SERVICES that of the \$750.00 Tuition Assistance Program award, \$475.00 was available income to the petitioner and was to be budgeted over a five month period in determining the amount of public assistance to which I was entitled.

9. A fair hearing was held at Albany, New York on or about May 24, 1976, before MERLE N. FOGG, Hearing Officer of respondent NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES. On or about August 12, 1976, I received a copy of the decision of respondent NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES from respondent Commissioner PHILIP L. TOIA. Said decision affirmed the determination of the ALBANY COUNTY DEPARTMENT OF SOCIAL SERVICES insofar as Tuition Assistance Program funds were properly budgeted as available income, but increased the amount to be so budgeted to \$550.00 due to a mathematical error and directed that said amount to be budgeted for the period April 26, 1976 through May 31,

Petition

1976. A copy of said Decision after Fair Hearing is annexed hereto as Exhibit "C" and made a part hereof.

10. The amount which respondents determined to be available income to the petitioner was derived by starting with petitioner's "necessary or essential school expenses" of \$925.00 and first deducting from this amount petitioner's Basic Education Opportunity Grant of \$700.00. The petitioner's Tuition Assistance Program grant of \$750.00 was then budgeted against petitioner's "necessary or essential school expenses" as reduced by the Basic Educational Opportunity Grant, with the excess \$525.00 being deemed available income for the purpose of determining the amount of petitioner's allowance under Aid to Families with Dependent Children.

11. The aforementioned computation was made even though the New York State Tuition Assistance Program is specifically for the purpose of assisting college students in paying tuition fees and Basic Educational Opportunity Grants are for the purpose of paying all reasonably related (not "necessary and essential") school expenses, including such items as room and board, and transportation.

12. The following provisions and rules of law are germane to the determination and decision of the respondents

(a) Article VI of the United States Constitution: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Law of any State to the contrary notwithstanding."

(b) *Almenarea v. Wyman*, 453 F. 2d 1075 (2nd Cir. 1971): State operated, federally reimbursed grant-in-aid programs must comply with Federal law.

(c) *Brown v. Bates*, 363 F. Supp. 897 (U.S.D.C., N.D. Ohio, 1973): Income "actually available for current use" to be

Petition

included in determining amount of assistance to be received by a categorical assistance recipient under Social Security Act, such as Aid to Families with Dependent Children, is income earned in permanent employment situation.

(d) 45 C.F.R. 233.20(a)(3)(iii): A State Plan for OAA, AFDC, AB, APTD or AABD must provide that, in determining the availability of income and resources, the following will not be included as income: loans and grants, such as scholarships, obtained and used under conditions which preclude their use for current living costs.

(e) 45 C.F.R. 233.20(a)(4)(ii): Such State Plans must provide that in determining need and the amount of assistance payment, the following will be *disregarded as income and resources*: Any grant or loan to any undergraduate student for educational purposes made or insured under any programs administered by the Commissioner of Education. (Emphasis added.)

(f) Section 352.16(c)(2) of the Regulations of the New York State Department of Social Services: "No grant or loan to any undergraduate student for educational expenses made or insured under any program administered by the United States Commissioner of Education shall be considered as *income or resources* in determining need and amount of assistance." (Emphasis added.)

13. The aforementioned determination and decision of the named respondents are directly contrary to each of the aforementioned provisions of law, and additionally constitute an arbitrary and capricious determination to allocate Basic Educational Opportunity Grants against "necessary or essential school expenses" even though such funds are available and properly used for other related expenses, while Tuition Assistance Program funds are for the sole purpose of paying tuition, one of the "necessary and essential" expenses.

14. The aforementioned determination and decision of

Petition

the respondent decided a frequently occurring issue of substantial public importance.

15. Petitioner and especially members of the represented class will be irreparably injured unless the respondents are enjoined temporarily, during the course of this action, and permanently from instituting the policy reflected in the aforementioned determination and decision vis a vis members of the represented class. Albany Business College begins its school year on August 30, 1976. Without the public assistance to which they are entitled to, members of the represented class will be forced to withdraw from Albany Business College, delaying their studies, or will be forced to devote less attention to their studies because of the resulting financial hardship.

16. This order to show cause is sought not only for the temporary injunctive relief which is being applied for, but also to provide a manner of service with which to commence this action and an accelerated return date. Albany Business College commences its school year on August 30, 1976 and a speedy resolution of the issue is in the interest of all parties to this action. Respondents have their offices in the County of Albany, but because it is not clear whether the individual respondents will be available for service and that delivery of process to people of suitable age and discretion at their respective offices can be reasonably calculated to give adequate notice of this proceeding, such notice would be proper. The County Attorney for Albany County and the Attorney General of the State of New York were also given advance notice of this petition and application for an order to show cause. Annexed hereto as Exhibit "D" and made a part hereof, is a copy of said notice together with a copy of the affidavit of service of same, sworn to by Edward Flink on the 17th day of August, 1976.

WHEREFORE, petitioners pray that this Court make and enter judgment pursuant to Article 78 of the CPLR:

1. annulling as contrary to law and arbitrary and

Petition

capricious, the ALBANY COUNTY DEPARTMENT OF SOCIAL SERVICES that reduced petitioner's grant of Aid to Families with Dependent Children by budgeting educational grants received by her for the 1976 Spring Semester;

2. annulling the decision, as contrary to law and arbitrary and capricious, of the NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES which affirmed the aforementioned determination of the ALBANY COUNTY DEPARTMENT OF SOCIAL SERVICES;

3. requiring the respondents, their employees, deputies and agents, for the purpose of determining income resources under the Aid for Dependent Children and Home Relief programs, to budge New York State Tuition Assistance Program funds or other educational loans, grants or scholarships received by the petitioner and by all members of the class on whose behalf this proceeding is brought, against "necessary or essential school expenses" as defined in Section 352.16 of the Regulations of the NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, without regard to, and excluding, grants or loans received by petitioner or the represented class under any program administered by the United States Commissioner of Education;

4. enjoining the respondents, their employees, deputies and/or agents from reducing or computing the petitioner's and the represented class' allowances under the Aid to Families With Dependent Children or the Home Relief programs by in any way budgeting or applying grants or loans received by petitioner or the represented class under any program administered by the United States Commissioner of Education against "necessary or essential school expenses" as defined in Section 352.16 of the Regulations of the NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES so as to reduce the amount of such "necessary or essential school expenses" against which all other loans, grants or scholarships are budgeted in determining available income or resources for the

Petition

purpose of Home Relief or Aid to Families with Dependent Children assistance;

5. requiring the respondents to forthwith take such actions as are necessary to reimburse petitioner or any member of the represented class for any reductions in assistance under the Home Relief or Aid to Families with Dependent Children programs that were caused by applying loans and grants under any program administered by the United States Commissioner of Education against: "necessary or essential school expenses" for the purpose of determining whether other educational loans, grants or scholarships constitute available income or resources;

6. granting such other and further relief as to this Court seems just, together with the costs and disbursements of this action.

Petitioners further pray that this Court order:

7. respondents to show cause before this court why the aforesaid relief should not be granted on a return date determined with due regard to the urgency of the issues presented;

8. that the respondents, their officers, agents and employees be restrained and stayed, jointly and severally, from reducing or computing the petitioner's and the represented class' allowances under the Aid to Families with Dependent Children or Home Relief programs by in any way budgeting or applying grants or loans received by petitioner or the represented class under any program administered by the United States Commissioner of Education against "necessary or essential school expenses" as defined in Section 352.16 of the Regulations of the NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES so as to reduce the amount of such "necessary or essential school expenses" against which all other grants, loans or scholarships are budgeted in determining available income or resources for the purpose of Home Relief or Aid to Families with Dependent Children;

A-26

Petition

9. providing that the manner of service set forth in the submitted order to show cause shall constitute due and adequate service.

Dated: August 18, 1976.
Albany, New York.

CASSANDRA LUMPKIN